SUPREME COURT OF THE UNITED STATES.

No. 771.—October Term, 1926.

W. I. Biddle, Warden of the United States Penitentiary at Leavenworth, Kansas, vs. Vuco Perovich.	On Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

[May 31, 1927.]

Mr. Justice Holmes delivered the opinion of the Court.

The Circuit Court of Appeals for the Eighth Circuit has certified questions of law to this Court upon facts of which we give an abridged statement. Perovich was convicted in Alaska of murder; the verdict being that he was 'guilty of murder in the first degree and that he suffer death.' On September 15, 1905, he was sentenced to be hanged and the judgment was affirmed by this Court. 205 U. S. 86. Respites were granted from time to time, and on June 5, 1909, President Taft executed a document by which he purported to "commute the sentence of the said Vuco Perovich . . to imprisonment for life in a penitentiary to be designated by the Attorney General of the United States." Thereupon Perovich was transferred from jail in Alaska to a penitentiary in Washington and some years later to one in Leavenworth, Kansas. In November, 1918, Perovich, reciting that his sentence had been commuted to life imprisonment, applied for a pardon—and did the same thing again on December 10, 1921. On February 20, 1925, he filed in the District Court for the District of Kansas an application for a writ of habeas corpus on the ground that his removal from jail to a penitentiary and the order of the President were without his consent and without legal authority. The District Judge adopted this view and thereupon ordered the prisoner to be set at large. We pass over the difficulties in the way of this conclusion and confine ourselves to the questions proposed. The

first is: "Did the President have authority to commute the sentence of Perovich from death to life imprisonment?"

Both sides agree that the act of the President was properly styled a commutation of sentence, but the counsel of Perovich urge that when the attempt is to commute a punishment to one of a different sort it cannot be done without the convict's consent. The Solicitor General presented a very persuasive argument that in no case is such consent necessary to an unconditional pardon and that it never had been adjudged necessary before *Burdick* v. *United States*, 236 U. S. 79. He argued that the earlier cases here and in England turned on the necessity that the pardon should be pleaded, but that when it was brought to the judicial knowledge of the Court "and yet the felon pleads not guilty and waives the pardon, he shall not be hanged." Jenkins, 129, Third Century, case 62.

We will not go into history, but we will say a word about the principles of pardons in the law of the United States. A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed. *See Ex parte Grossman*, 267 U. S. 87, 120, 121. Just as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, the public welfare, not his consent determines what shall be done. So far as a pardon legitimately cuts down a penalty it affects the judgment imposing it. No one doubts that a reduction of the term of an imprisonment or the amount of a fine would limit the sentence effectively on the one side and on the other would leave the reduced term or fine valid and to be enforced, and that the convict's consent is not required.

When we come to the commutation of death to imprisonment for life it is hard to see how consent has any more to do with it than it has in the cases first put. Supposing that Perovich did not accept the change, he could not have got himself hanged against the Executive order. Supposing that he did accept, he could not affect the judgment to be carried out. The considerations that led to the modification had nothing to do with his will. The only ques-

tion is whether the substituted punishment was authorized by law —here, whether the change is within the scope of the words of the Constitution, Article II, Section 2: "The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." We cannot doubt that the power extends to this case. By common understanding imprisonment for life is a less penalty than death. It is treated so in the statute under which Perovich was tried, which provides that "the jury may qualify their verdict [guilty of murder] by adding thereto 'without capital punishment'; and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life." Criminal Code of Alaska, Act of March 3, 1899, c. 429, § 4, 30 Stat. 1253. See *Ex parte Wells*, 18 How. 307; *Ex parte Grossman*, 267 U. S. 87, 109. The opposite answer would permit the President to decide that justice requires the diminution of a term or a fine without consulting the convict, but would deprive him of the power in the most important cases and require him to permit an execution which he had decided ought not to take place unless the change is agreed to by one who on no sound principle ought to have any voice in what the law should do for the welfare of the whole. We are of opinion that the reasoning of *Burdick* v. *United States*, 236 U. S. 79, it not to be extended to the present case. The other questions certified become immaterial as we answer the first question: Yes.

The Chief Justice took no part in this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.